Supreme Court, U.S.
FILED
MAR 12 1988
JOSEPH F. SPANIOL
CLERK

No. 87-967

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1987

AUDREY PRICE, NAILA KURDI, SHARON ATRA, EUGENE STERN, and PATRICIA MARQUARDT, individually and on behalf of all others similarly situated, and HOPE FAIR HOUSING CENTER,

Petitioners

vs.

SAMUEL PIERCE, in his official capacity as Secretary of the United States Department of Housing and Urban Development; A. D. VAN METER, in his official capacity as Chairman of the Illinois Housing Development Authority; JAMES KILEY, in his official capacity as Executive Director of the Illinois Housing Development Authority; HAWTHORN RIDGE ASSOCIATES, an Illinois limited partnership; VERNON HILLS ASSOCIATES II, an Illinois limited partnership; TRAILS VENTURE, an Illinois limited partnership; GRANWOOD GARDENS ASSOC., an Illinois limited partnership; PRAIRIEBROOK VENTURE, an Illinois limited partnership; ARROWHEAD APARTMENT ASSOCIATES, an Illinois limited partnership,

Respondents

REPLY TO BRIEFS IN OPPOSITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BERNARD H. SHAPIRO
Prairie State Legal Services
208 West State Street—Suite 802
Rockford, IL 61101
815 965-2134

GERALD BRASK
Prairie State Legal Services

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... (ii)

ARGUMENT 1

CONCLUSION 5

TABLE OF AUTHORITIES

CASES

Board of Regents v. Roth, 408 U.S. 577 (1972) 4

Goldberg v. Kelly, 397 U.S. 254 (1974) 4

Ressler v. Pierce, 692 F.2d 1212 (9th Cir. 1982) 3

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 3

ARGUMENT

Plaintiffs' reply addresses three arguments made by the federal and state defendants in their briefs in opposition:

1. The reasons set forth by defendants in their respective briefs in opposition underscore the importance of this Court granting review. Both the federal and state defendants claim virtually total discretion in determining how many, if any, of the Section 8 contract units will be rented to lower income families for contracts entered into prior to 1981. In doing so they rely heavily on the 1981 Amendments to the Section 8 Program.

The 1981 Amendments, Pub. L. No. 97-35, were, as acknowledged by the Secretary of the United States Department of Housing and Urban Development ("HUD") in his brief opposition, a specific reaction on the part of Congress to underutilization of Section 8 units. The New Construction Section 8 Program, enacted as a part of the Housing and Community Development Act of 1974, Pub. L. 93-383, was being seriously compromised by a widespred practice on the part of private developers and state agencies, such as the Illinois Housing Development Authority ("IHDA"), to purposefully rent only a portion of contractually specified apartment units to eligible persons. Defendants urge this Court to read those amendments as providing them virtually absolute discretion to decide whether to rent all, part or none of the apartment units specified in the pre-1981 Section 8 contracts to lower income families.

HUD asserts that no remedy is available to lower income persons, whose ability to obtain decent, safe and sanitary housing is frustrated by virtue of the decision not to rent contract units to low income families. IHDA contends that Congress intended to vest discretion in IHDA over the degree of utilization of Section 8 units in projects funded prior to the 1981 amendments. Thus, under the defendants' interpretation, the 1974 Act is construed as permitting parties to Section 8 contracts to use any number of committed apartment units for rental to families ineligible for Section 8 housing.

Such an interpretation, of course, reduces the Housing and Community Development Act of 1974 to little more than a provider of incentives to private developers to partake of low interest financing and guaranteed rentals with no commitment to provide housing to lower income families—except insofar as they deem prudently financially appropriate. Plaintiffs submit that this interpretation of the legislation runs contrary to the stated purpose of the Section 8 Program to aid lower income families in obtaining a decent place to live. 42 U.S.C. 1437f(a). It is therefore appropriate for this Court to determine whether parties to Section 8 contracts can insulate themselves from challenge and review of decisions which act to shut the door to persons for whose benefit the statute was enacted.

2. Both the federal and state defendants take refuge behind the "Pandora's Box" resolution to the third party beneficiary claims of plaintiffs. Plaintiffs, citing provisions of the statute, regulations and the contracts, have argued that they are third party beneficiaries to those provisions of the Section 8 contracts which require defendants to rent committed apartment units to lower income families eligible for the Section 8 Program. The court below responded that plaintiffs' third party beneficiary assertions would result in "almost every lower income person in the United States [as] a potential plaintiff . . ." (App. at 10.) In addition IHDA argues that only tenants could properly be construed as third party beneficiaries under Section 8 contracts.

This fear of opening the "Pandora's Box" to unlimited third party beneficiary's claims, relied upon below, is not an adequate resolution of the third party beneficiary considerations. Plaintiffs and class members in this case do not consist of poor persons throughout the United States or for that matter throughout the Chicago area. Rather, they consist of persons who applied for admission to one of the six housing developments involved in this lawsuit and were placed on waiting lists because there were not presently

available apartments for rental to Section 8 eligible persons.[1] Indeed, the class definition limits persons involved in this lawsuit to persons who have attempted to obtain housing at one of the six developments. Moreover, in raising the specter of thousands of lower income persons descending upon these developers, the court below overlooked the earlier portion of its own decision in this case when it considered the applicability of standing principles to the plaintiffs. Whether or not it is possible to construe third party beneficiary status to persons having no factual connection to particular housing developments, it remains that such persons would have to establish standing. Such persons without any factual connection to a particular housing development, would lack the ability to demonstrate the necessary minimal contact to the developments involved. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977).

Insofar as IHDA seeks to convey third party beneficiary status only to those persons who are tenants as opposed to applicants, it ignores the purpose for which the legislation was enacted. That purpose, as set forth at the front of the statute, is to provide decent, safe and sanitary housing to persons not presently living in such housing. 42 U.S.C. 1437f(a). Indeed, applicants, not tenants, are probably persons presently not residing in adequate housing.

3. Both the state and federal defendants assert in their briefs in opposition that no conflict exists between the decision of the court below and the decision of the Court of Appeals for the Ninth Circuit in *Ressler v. Pierce,* 692 F.2d 1212 (9th Cir. 1982). Defendants argue that *Ressler* involved procedural due process, whereas the instant case involves substantive due process. The distinction is irrelevant in determining whether a conflict between the circuits

---

[1] IHDA raises as a "hurdle" a standing issue based upon its claim that in most instances plaintiffs did not fill out applications for admission to the particular housing development. What IHDA's assertion overlooks is that it was the policy at five out of the six developments to place individuals on the waiting list upon request and to only accept the formal application when a person made it to the top of the waiting list. (See Summary Judgment App. at *281*). Moreover, IHDA's assertions of lack of standing on the part of plaintiffs have been rejected by both the district court and the court of appeals in this case. (App. at 5, 20–21).

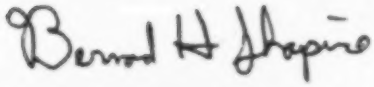
exists.[2] Where the conflict lies relates to the question of whether applicants for housing under the New Construction Section 8 Program have an enforceable interest sufficient to implicate the protection provided by the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *Board of Regents v. Roth,* 408 U.S. 577 (1972). The Court of Appeals for the Ninth Circuit in *Ressler,* found that applicants for such housing have a protected interest. The court below in this case found that they do not. Thus, a conflict does exist.

[2]The process sought below by plaintiffs is not properly characterized as substantive due process. Plaintiffs argued in their brief below that due process would require the parties to establish standards such as those contained in the HUD Handbook, as well as the opportunity to be heard on whether defendants' utilization practices conformed with such standards. *See Goldberg v. Kelly,* 397 U.S. 254 (1974).

CONCLUSION

For these reasons and the reasons stated in plaintiffs' petition, a Writ of Certiorari should issue.

Respectfully submitted,



Bernard H. Shapiro
Gerald Brask
Prairie State Legal Services